SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 353

IVAN MRVICA, PETITIONER,

vs.

P. A. ESPERDY, DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Second Circuit		
Appendix to plaintiff-appellant's brief consisting of portions of record from the United States District Court for the Southern District of New York	A	1
Docket entries	1	2
Complaint	2	3
Affidavit in support of cross-motion	6	5
Opinion, Metzner, J.	7	6
Judgment	10	8
Administrative record	11	9
Notice of denial of the Immigration and Naturalization Service, dated April 15, 1960	11	9
Notice of affirmance of denial of the Immigration and Naturalization Service, dated May 17, 1960	13	10
Opinion, Smith, J.	14	11
Judgment	18	14
Clerk's certificate (omitted in printing)	20	14
Order allowing certiorari	21	15

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 19, 1963

[fol. A] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 27553

October Term, 1962

IVAN MRVICA, Plaintiff-Appellant,

—v.—

P. A. ESPERDY, District Director, Immigration & Naturalization Service, Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO PLAINTIFF-APPELLANT'S BRIEF—
Filed January 30, 1963

[fol. 1]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DOCKET ENTRIES

Date	*Proceedings and Papers Filed*
June 21, 1960	Filed complaint and issued summons
July 1, 1960	Filed summons and return, served defendant Esperdy
Jan. 19, 1962	Filed defendant's affidavit, memorandum and notice of motion for summary judgment Ret. 2-13-62.
Feb. 7, 1962	Filed plaintiff's affidavit and notice of motion for summary judgment Ret. 2-13-62.
Feb. 7, 1962	Filed plaintiff's memorandum in support of motion
Feb. 7, 1962	Filed affidavit of Edith Lowenstein in opposition
Feb. 20, 1962	Memorandum endorsed on plaintiff's motion filed 2-7-62—Motion denied. See opinion on defendant's motion for summary judgment—Metzner, J.
Feb. 21, 1962	Filed opinion #27,585—plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted. So ordered—Metzner, J.
Feb. 21, 1962	Filed judgment; adjudged: the defendant has judgment against the plaintiff—Clerk.
Apr. 6, 1962	Filed plaintiff's notice of appeal
Apr. 6, 1962	Filed Bond. ($250.00) undertaking for costs on appeal.

[fol. 2]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 2449

IVAN MAVICA, Plaintiff,

—v.—

P. A. ESPERDY, District Director, Immigration & Naturalization Service, United States Department of Justice, Defendant.

COMPLAINT—Filed June 21, 1960

The plaintiff, a citizen and national of Yugoslavia, by his attorney for his complaint, respectfully alleges:

1. This is an action for a declaratory judgment under the Declaratory Judgment Act (28 U. S. C. 2201) and for review of an administrative ruling and for an injunction under the Administrative Procedure Act (5 U. S. C. 1001 et seq.).

2. The plaintiff was born in Yugoslavia in December 17, 1906. He entered the United States on January 21, 1940 as a non-immigrant crewman and remained in the United States, overstaying his temporary permit.

3. On September 4, 1942 he was ordered deported, but was granted a waiver of inadmissibility under the Ninth Proviso of Section 3 of the Act of February 5, 1917 for [fol. 3] entry into the United States as a crewman without special permission of the Attorney General.

4. Plaintiff effected his own deportation by departing from the United States on October 6, 1942 on the SS Dubravka and thereafter reentered on the same vessel at the completion of the trip on the basis of permission granted him prior to sailing on December 19, 1942, this being the only interruption of his physical presence in the United States from January 21, 1940 to date.

5. On January 6, 1960 the plaintiff filed an application for status as permanent resident pursuant to Section 249 of the Immigration and Nationality Act, as amended by P. L. 85-616 (8 U. S. C. 1259, as amended). The application was filed on the basis that plaintiff entered the United States prior to June 28, 1940, has resided in the United States continuously since such entry, is a person of good moral character, and is not ineligible to citizenship.

6. On April 15, 1960 the plaintiff was advised that his application "to create record of admission for permanent residence" has been denied for the following reason:

> "You are ineligible for the benefits of Section 249 of the Immigration and Nationality Act, as amended, due to your deportation from the United States on October 6, 1942, which constituted a break in your continuous residence in the United States. (Matter of P— Interim Decision 976.)"

7. On May 17, 1960 plaintiff was advised that the Regional Commissioner for the Northeastern Region has af- [fol. 4] firmed the denial of plaintiff's application under Section 249 of the Immigration and Nationality Act.

8. Section 249, Immigration and Nationality Act, as amended by P. L. 85-616 (8 U. S. C. 1259 as amended) authorizes creation of a record of lawful admission for permanent residence, of aliens who entered the United States prior to June 28, 1940, if they have resided in the United States continuously since entry. The plaintiff fulfills this requirement, his temporary absence having been a break in physical presence, but not in residence.

9. Defendant, in ruling that plaintiff's temporary absence from the United States, during which he executed a pending deportation order, was a break in his residence, even though plaintiff returned with advance permission to return and defendant must have known that due to war conditions, plaintiff's return to the United States was inevitable, is a misinterpretation of the statute or in the alternative, a denial of due process of law under the Constitution of the United States.

Wherefore, plaintiff prays for judgment declaring:

A. That the denial of his application for a record of admission for permanent residence is illegal, in violation of the statute, and unconstitutional.

B. That plaintiff is statutorily eligible to create a record of admission for permanent residence under Section 249 of the Immigration and Nationality Act, as amended by P. L. 85-616 (8 U. S. C. 1259, as amended).

C. That the defendant should be restrained from taking plaintiff into custody and deporting him *pendente lite* and [fol. 5] until final determination of his application under Section 249 of the Immigration and Nationality Act, as amended by P. L. 85-616 (8 U. S. C. 1259, as amended).

D. For such other and further relief as may be deemed appropriate in the premises.

Edith Lowenstein, Attorney for Plaintiff, Office & P. O. Address, 501 Fifth Avenue, New York 17, New York.

Dated: June 20, 1960.

[fol. 6]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT IN SUPPORT OF CROSS-MOTION—
Filed February 7, 1962

State of New York,
County of New York, ss.:

I, IVAN MRVICA, being duly sworn, depose and say:

I have been in the United States since January 1940 and since that time I have never been in any other country except on that one trip in 1942.

When I left on that trip everybody knew that I would come back since there was no place to go during that time

and they needed people for work in the United States and were glad to have me.

When I left on that ship I had no papers to go to any other country and I could not have gone to any other country if I had wanted to. The Immigration Service knew that and I knew that and the captain on the ship knew that.

Ivan Mrvica

(Sworn to January 25, 1962.)

[fol. 7]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OPINION—Filed February 20, 1962

METZNER, *D.J.*:

This action for a declaratory judgment came on to be heard on cross-motions for summary judgment. The action seeks a review of the Attorney General's denial of plaintiff's application to have created a record of lawful admission to this country for permanent residence under section 249 of the Immigration and Nationality Act (8 U. S. C. §1259). Plaintiff claims that the refusal to grant his application was erroneous as a matter of law.

The action taken was predicated solely on the ground that plaintiff did not meet the requirement of continuous residence in the United States after his entry into the country as prescribed by section 249. The pertinent portions of section 249 read as follows:

> "A record of lawful admission for permanent residence may . . . be made in the case of any alien . . . if no such record is otherwise available and such alien shall satisfy the Attorney General that he . . . (b) has had his residence in the United States continuously since such entry;"

Plaintiff originally entered this country as a nonimmigrant crewman on January 21, 1940. He overstayed his

shore leave and was ordered deported on September 4, 1942. The warrant of deportation provided:

> [fol. 8] "If the alien returns to the United States from time to time and upon inspection is found to be a bona fide seaman and entitled to shore leave, except for prior deportation, admission under the 9th Proviso of Section 3 of the Act of February 5, 1917, in reference to this ground of inadmissibility is hereby authorized for such time as the alien may be admitted as a seaman."

On October 6, 1942 the plaintiff voluntarily left this country under the order of deportation, and a note was made in the files of the Immigration and Naturalization Service that the warrant of deportation was executed.

Sometime around the middle of December 1942 the vessel on which the plaintiff had shipped out returned to the United States, and plaintiff left the ship to seek medical care and never returned to the ship. Thereafter, on March 28, 1952, a hearing was held on his deportability, at which time he stated that when he came ashore in December of 1942 he did not intend to ship out again on that vessel. Rather, he intended to obtain a berth on an American vessel, and if he could not get one it was his intention to stay in this country. Subsequently, the plaintiff did not take advantage of different orders granting him voluntary departure and conditional voluntary departure, and finally an order of deportation was entered and the present application, pursuant to section 249, followed.

On this state of the record, this case is indistinguishable from *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292 (N.D. Cal. 1960), *aff'd*, 287 F. 2d 561 (9th Cir. 1961) and *Lum Chong* v. *Esperdy*, 191 F. Supp. 935 (S.D.N.Y. 1961). These cases clearly hold that an alien subject to a deportation order who departs as a crewman on a foreign voyage [fol. 9] thereby breaks his continuous residence for the purposes of section 249. In the *Lum Chong* case, as in the instant case, the plaintiff returned to this country as a crewman on the same vessel on which he departed, without having disembarked on foreign soil during the voyage.

I agree with the defendant that the granting of Ninth Proviso benefits to the plaintiff in the original order of deportation has no bearing on the disposition of this action. Even if this were to be considered, it only provided that the plaintiff be permitted shore leave in the future if he returned to this country as a bona fide seaman. This did not accord the plaintiff the right to re-enter for permanent residence and cannot be considered as a waiver of the requirement of continuous residence in section 249. Furthermore, by the plaintiff's own admission in his subsequent deportation hearing, he did not return to this country as a bona fide seaman, and therefore was not eligible for the benefits of the Ninth Proviso.

Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted. So ordered.

Dated: New York, New York, February 20, 1962.

Charles M. Metzner, U.S.D.J.

[fol. 10]

In United States District Court

Southern District of New York

Judgment—February 21, 1962

The Honorable Charles M. Metzner, in an opinion had February 20, 1962 and filed February 21, 1962, having denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment; it is

Adjudged: The defendant have against the plaintiff.

Herbert A. Carlson, Clerk.

Dated: New York, N. Y., February 21, 1962.

[fol. 11]

NOTICE OF DENIAL, APRIL 15, 1960

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
20 West Broadway
New York 7, New York

Refer to this File No.
A2 645 117

APR 15 1960

Mr. Ivan Mrvica
414 W. 53rd St.
New York, N. Y.

Dear Sir:

Notice of Denial

Your application to create record of admission for permanent residence has been denied for the following reasons:

You are ineligible for the benefits of Section 249 of the Immigration and Nationality Act, as amended, due to your deportation from the United States on October 6, 1942, which constituted a break in your continuous residence in the United States. (Matter of P..... Interim Decision 976.)

If you desire to appeal this decision you may do so. Your notice of appeal must be filed within fifteen days from the date of this notice. If no appeal is filed within the time allowed, this decision is final.

Appeal in your case may be made to the

☐ Board of Immigration Appeals in Washington, D. C., on Form I-290 A

☒ Regional Commissioner on Form I-290 B

[fol. 12] Copies of the appropriate form have been sent to your attorney. If an appeal is desired, the Notice of Appeal shall be executed and filed with this office, together with

a fee of Ten Dollars. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any question which you may have will be answered by the local immigration office nearest your residence, or at the address shown in the heading to this letter.

Sincerely yours,

P. A. Esperdy, District Director, New York District.

Enclosures, Form I-292 (Rev. 6-1-59)

[fol. 13]

NOTICE OF AFFIRMATION OF DENIAL, MAY 17, 1960

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
20 West Broadway
New York 7, New York

A2 645 117

May 17, 1960

Mr. Ivan Mrvica
414 W. 53rd St.
New York, N. Y.

Dear Sir:

The Regional Commissioner, Burlington, Vermont has affirmed the denial of your application to create record of admission for permanent residence under Section 249 of the Immigration and Nationality Act.

Very truly yours,

R. B. Lindsey, Chief, Applications Section.

Certified

[fol. 14]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 274—October Term, 1962

Argued March 14, 1963

Docket No. 27553

IVAN MRVICA, Plaintiff-Appellant,

v.

P. A. ESPERDY, District Director, Immigration & Naturalization Service, Defendant-Appellee.

Before: Moore, Friendly and Smith, Circuit Judges.

Appeal from order denying plaintiff's motion for summary judgment, granting defendant's motion for summary judgment, and dismissing action for declaratory judgment of eligibility for record of permanent admission under Section 249 of the Immigration and Nationality Act, as amended (8 U. S. C. § 1259), and for injunction against deportation *pendente lite*, in the United States District Court for the Southern District of New York, Charles M. Metzner, District Judge. Affirmed.

Edith Lowenstein, New York, N. Y., for plaintiff-appellant.

[fol. 15]

Roy Babitt, Special Asst. U. S. Attorney, New York, N. Y. (Robert M. Morgenthau, U. S. Attorney for the So. Dist. of New York, on the brief), for defendant-appellee.

OPINION—May 14, 1963

SMITH, Circuit Judge:

Plaintiff, a native of what is now Yugoslavia, entered the United States as a non-immigrant crewman January 21,

1940 and resided continuously in the United States thereafter, except for the period from September 4, 1942 to October 6, 1942 when he was on a South American voyage in a Yugoslav vessel as a seaman, under order of deportation, with a permit for temporary re-entry as a seaman under the Ninth Proviso of Section 3 of the Act of February 5, 1917.[1] He was again ordered deported in 1952 and presently remains here under an administrative stay pending decision in another action, *Dombrovskis* v. *Esperdy*, 195 F. Supp. 488, S. D. N. Y. 1961, appeal pending. He brought this action in the United States District Court for the Southern District of New York on June 21, 1960, under the Declaratory Judgment Act, 28 U. S. C. § 2201, and the Administrative Procedure Act, 5 U. S. C. § 1001 *et seq.*, seeking to establish his eligibility for status as a permanent resident under Section 249 of the Immigration and Nation- [fol. 16] ality Act (8 U. S. C. § 1259)[2] as one who had entered the United States prior to June 28, 1940, had resided

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[1] The text of the Ninth Proviso follows:

"• • • *Provided further* [9] That the Commissioner of Immigration and Naturalization with the approval of the Attorney General shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission • • •."

[2] Sec. 249 (8 U. S. C. 1259) as amended:

"A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship."

here continuously since such entry, and was otherwise qualified. Plaintiff's motion for summary judgment was denied, defendant's granted, and the action dismissed by the District Court, Charles M. Metzner, District Judge, and plaintiff appeals. We find no error in the court's determination that the 1942 absence interrupted his continuous residence, within the meaning of the statutes, and we affirm.

The issue is by no means as free from doubt as appellee would have us believe, since the language of § 249 speaks in terms of continuous "residence" defined as "place of general abode"; "principal, actual dwelling place in fact, without regard to intent", and it is strenuously and plausibly argued that a merchant ship at sea in a time of worldwide naval war is hardly to be considered in retrospect as having been a "place of general abode". But in determining the meaning of the section we may not ignore the statutory framework in which it exists. Section 101(g) (8 U. S. C. § 1101(g)) provided then as now that any alien ordered deported, who has left the United States, should be considered to have been deported pursuant to law. It is difficult to credit an intent to the Congress to hold a [fol. 17] voyage not an interruption of continuous residence when it operated as a statutory deportation. We agree with the interpretation of the Attorney General in *Matter of P*, VIII I. & N. Dec. 167, 169 (Comm. 1958) that departure while under expulsion proceedings breaks the continuity of residence required by Section 249. Cf. *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292 (N. D. Calif. 1960), aff'd 287 F. 2d 561 (9 Cir. 1961); *Lum Chong* v. *Esperdy*, 191 F. Supp. 935 (S. D. N. Y. 1961).

At the time of Mrvica's voyage in 1942, relief similar to that now provided by Section 249 (then provided to those who had been in the United States since 1924) was not granted to those subject to deportation. This limitation was, however, removed in 1958. No such exception, however, was made for those like Mrvica, whose deportation had actually occurred during the required period of continuous residence. The removal of the limitation does not affect Mrvica's continuity of residence.

We do not feel that forgiveness of illegal acts of entry before a cut off date necessitates a finding of an intent that

illegal re-entry after the cut off date be also swept within the amnesty by interpreting the continuous residence requirement so that the deportation and illegal re-entry might be ignored. In short, we think Congress did not intend that two illegal periods of residence should be aggregated to make one continuous period. If the Congress should again move up the cut off date it would, of course, solve the problem of those in Mrvica's position, but that is not our province here. Judgment dismissing the complaint is affirmed.

[fol. 18]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

IVAN MRVICA, Plaintiff-Appellant,

v.

P. A. ESPERDY, District Director, Immigration and Naturalization Service, United States Department of Justice, Defendant-Appellee.

JUDGMENT—May 14, 1963

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 19] [File endorsement omitted]

[fol. 20] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 21]

SUPREME COURT OF THE UNITED STATES

No. 353—October Term, 1963

IVAN MRVICA, Petitioner,

vs.

P. A. ESPERDY, District Director, Immigration and Naturalization Service.

ORDER ALLOWING CERTIORARI—October 28, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.